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In the Supreme Court of the United States

OCTOBER TERM, 1998

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, WASHINGTON, D.C. AND FEDERAL LABOR RELATIONS AUTHORITY

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, WASHINGTON, D.C. AND NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER FEDERAL LABOR RELATIONS AUTHORITY

DAVID M. SMITH*
Solicitor

JAMES F. BLANDFORD
Attorney

Federal Labor Relations Authority
607 14th Street, N.W.
Washington, D.C. 20424-0001
(202) 482-6620

**Counsel of Record*

QUESTION PRESENTED

Whether a federal agency employer has a duty to bargain over a proposal that would create a contractual obligation to negotiate over union-initiated proposals offered during the term of a collective bargaining agreement.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT	2
A. The Federal Service Labor-Management Relations Statute	2
B. The Instant Case	5
1. Factual Background	5
2. Relevant Administrative and Judicial Precedent	6
a. The D.C. Circuit's Decision in *NTEU* v. *FLRA*	6
b. The Fourth Circuit's Decision in *SSA* v. *FLRA*	8
c. The Fourth Circuit's Decision in *Energy* v. *FLRA*	9
3. The Decision of the Court of Appeals in the Instant Case	11
SUMMARY OF ARGUMENT	12
ARGUMENT	16

Argument—Continued

I. The Authority Properly Determined That an Agency Is Obligated Under the Statute to Bargain over Union-Initiated Midterm Proposals and a Bargaining Proposal That Restates That Obligation Is Negotiable 16

A. The Authority's Interpretation is Supported by the Language of the Statute and Entitled to Deference 18

1. The Statute Establishes a Broad Duty to Bargain 18

2. Deference Is Owed to the Authority's Interpretation 2

3. The Fourth Circuit Has Improperly Failed to Defer to the Authority and Has Misinterpreted the Statute 20

B. Neither the Statute's Legislative History Nor Practice Under the Predecessor Executive Order Supports the Fourth Circuit's Position 23

1. The Fourth Circuit Misconstrues the Senate Report 24

2. The Fourth Circuit Mistakenly Interprets Precedent Established under Executive Order 11,491 26

Argument—Continued
C. The Fourth Circuit Improperly Rejected Relevant Private Sector Precedent 28
1. Private Sector Precedent on Midterm Bargaining Is Relevant to Interpreting the Statute 28
2. The Fourth Circuit's Rationale for Discounting Private Sector Precedent Is Flawed 30
3. The Authority Reasonably Adopted Private Sector Limitations on Midterm Bargaining 32
D. The Authority's Holding Furthers the Purposes and Goals of the Statute 33
II. Even If There Is No Statutory Obligation to Bargain Midterm, a Contract Provision Providing for Midterm Bargaining Is Negotiable Because It Is Not Inconsistent with Applicable Law, Rule, or Regulation ... 36
A. The Obligation to Bargain Is Not Delimited by the Rights Granted under the Statute 38
B. Union-Initiated Midterm Bargaining Is Not Inconsistent with Law or Applicable Regulation 39
1. A Bargaining Proposal Providing for Union-Initiated Midterm Bargaining Is Not Inconsistent with the Statute .. 40

Argument—Continued

2. The Fourth Circuit's Concern that Permitting Unions to Negotiate for Midterm Bargaining Would Effectively Vitiate *SSA* v. *FLRA* Will Be Rendered Moot by a Meaningful Resolution of this Case 42

3. The Court of Appeals Has Identified No Provision of Law That Would Prohibit an Agency from Engaging in Midterm Bargaining 44

4. The Union's Proposal Is Negotiable Because Bargaining over Union-Initiated Midterm Proposals Is Within the Agency's Discretion 45

CONCLUSION 47

TABLE OF AUTHORITIES

Cases:

AFGE, Interdepartmental Local 3723, AFL-CIO, 9 FLRA 744 (1982), *aff'd*, 712 F.2d 640 (D.C. Cir. 1983) 35

AFGE, Local 1698 and U.S. Dep't of the Navy, Naval Aviation Supply Office, Philadelphia, Pa., 38 FLRA 1016 (1990) 41

AFGE, Local 2782 v. *FLRA*, 702 F.2d 1183 (D.C. Cir. 1983) 23

AFGE v. *FLRA*, 785 F.2d 333 (D.C. Cir. 1986) 42

Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 45 FLRA 1290 (1992) 8

American Fed'n of Gov't Employees v. *FLRA*, 778 F.2d 850 (D.C. Cir. 1985) 5, 9

Army and Air Force Exch. Serv., Capitol Exch. Region Headquarters, Case No. 22-6657(CA), 2 *Rulings on Request for Review* 561 (Ass't Sec'y of Labor 1976) 26

Beth Israel Hospital v. *NLRB*, 437 U.S. 483 (1978) 33

Brecht v. *Abrahamson*, 507 U.S. 619 (1993) ... 31

Bureau of Alcohol, Tobacco and Firearms v. *FLRA*, 464 U.S. 89 (1983) .....*passim*

Caterpillar, Inc. v. *Lewis*, ___ U.S. ___, 117 S. Ct. 467 (1996) 17

Chevron U.S.A., Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) .. 13, 19

City of St. Louis v. *Praprotnik*, 485 U.S. 112 (1988) 17

Conley v. *Gibson*, 355 U.S. 41 (1957) 34

Council of Prison Locals v. *Brewer*, 735 F.2d 1497 (D.C. Cir. 1984) 4, 43, 44

Department of Defense, Office of Dependents Schools v. *FLRA*, 879 F.2d 1220 (4th Cir. 1989) 4

Department of Defense v. *FLRA*, 659 F.2d 1140 (D.C. Cir. 1981) .....*passim*

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Department of Health and Human Servs. v. *FLRA*, 976 F.2d 1409 (D.C. Cir. 1992) 20

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Department of the Navy, Military Sealift Command v. *FLRA*, 836 F.2d 1409 (3d Cir. 1988) 37

Department of the Navy, United States Marine Corps, 34 FLRA 635 (1990) 45

Department of the Treasury, U.S. Customs Serv. v. *FLRA*, 836 F.2d 1381 (D.C. Cir. 1988) 16, 46

Department of the Treasury v. *FLRA*, 494 U.S. 922 (1990) 21

Federal Employees Metal Trade Council, AFL-CIO v. *FLRA*, 778 F.2d 1429 (9th Cir. 1985) 41

Federal/Postal/Retiree Coalition v. *Devine*, 751 F.2d 1424 (D.C. Cir. 1985) 3

FLRA v. *Internal Revenue Service*,
838 F.2d 567 (D.C. Cir. 1988) ..... *passim*

Fort Stewart Schools v. *FLRA*, 495 U.S. 641
(1990) 19, 38

Illinois National Guard v. *FLRA*,
854 F.2d 1396 (D.C. Cir. 1988) 46

INS v. *FLRA*, 855 F.2d 1454
(9th Cir. 1988) 14, 27

Internal Revenue Serv., 17 FLRA 731 (1985) .. 6

Internal Revenue Serv., 29 FLRA 162
(1987) ..... *passim*

IRS v. *FLRA*, 717 F.2d 1174 (7th Cir. 1983) ... 37

Johnston v. *Penrod Drilling Co.*,
803 F.2d 867 (5th Cir. 1986) 22

Karahalios v. *NFFE*, 489 U.S. 527 (1989) 29

Library of Congress v. *FLRA*, 699 F.2d 1280
(D.C. Cir. 1983) 29, 37

*Merit Sys. Protection Bd. Prof'l Ass'n and
Merit Sys. Protection Bd., Washington, D.C.*,
30 FLRA 852 (1988) 6

*Missouri Nat'l Guard, Office of the
Adjutant Gen., Jefferson City, Missouri*,
31 FLRA 1244 (1988) 8

*National Fed'n of Federal Employees,
Local 2099 and Dep't of the Navy, Naval
Plant Representative Office, St. Louis, Mo.*,
35 FLRA 362 (1990) 41, 42

National Treasury Employees Union and Dep't of the Treasury, U.S. Customs Serv., 21 FLRA 6 (1986), *enforced*, 836 F.2d 1381 (D.C. Cir. 1988) 39

National Treasury Employees Union and U.S. Dep't of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Washington, D.C., 43 FLRA 1442 (1992), *remanded on other grounds*, 30 F.3d 1510 (D.C. Cir. 1994) 38

National Treasury Employees Union Chapter 83 and Dep't of the Treasury, Internal Revenue Serv., 35 FLRA 398 (1990) 44

National Treasury Employees Union v. *FLRA*, 810 F.2d 295 (D.C. Cir. 1987) .....*passim*

Navy Public Works Ctr., Pearl Harbor, Honolulu, Hawaii v. *FLRA*, 678 F.2d 97 (9th Cir. 1982) 37

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NLRB v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990) 20

NLRB v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975) 20

NLRB v. *Jacobs Mfg. Co.*, 196 F.2d 680 (2d Cir. 1952) 14, 31

NLRB v. *Sands Mfg. Co.*, 306 U.S. 332 (1939) 31

NTEU v. *FLRA*, 691 F.2d 553 (D.C. Cir. 1982) 27

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Nuclear Regulatory Comm'n v. *FLRA*, 895 F.2d 152 (4th Cir. 1990) 15, 37

Social Security Admin. v. *FLRA*, 956 F.2d 1280 (4th Cir. 1992) ..... *passim*

Turgeon v. *FLRA*, 677 F.2d 937 (D.C. Cir. 1982) 29

United States Dep't of Health and Human Servs. v. *FLRA*, 976 F.2d 229 (4th Cir. 1992) 38

United States v. *Wells*, ___ U.S. ___, 117 S. Ct. 921 (1997) 32

United States v. *Williams*, 504 U.S. 36 (1992) .. 17

U.S. Department of Energy, Washington, D.C., 51 FLRA 124 (1995) ..... *passim*

U.S. Dep't of Health and Human Servs., Social Sec. Admin., Baltimore, Md., 47 FLRA 1004 (1993) 35

U.S. Naval Ordnance Station, Louisville, Kentucky v. *FLRA*, 818 F.2d 545 (6th Cir. 1987) 42, 47

U.S. Patent and Trademark Office, 45 FLRA 1090 (1992), *rev'd*, 991 F.2d 790 (4th Cir. 1993) 8

Statutes, rules and regulations:

The Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101-7135 (1994 & Supp. II 1996) 2

5 U.S.C. 7101(a) 14, 34
5 U.S.C. 7101(a)(1) 14, 28, 41
5 U.S.C. 7101(b) 34
5 U.S.C. 7103(a)(8) 18
5 U.S.C. 7103(a)(12) ..... *passim*
5 U.S.C. 7103(a)(14) 3
5 U.S.C. 7105 19
5 U.S.C. 7105(a)(1), (2) 3, 33
5 U.S.C. 7106(a) 22, 32, 46
5 U.S.C. 7106(b)(2) 22
5 U.S.C. 7106(b)(3) 22
5 U.S.C. 7114(a)(4) 13, 18
5 U.S.C. 7114(b)(2) 3
5 U.S.C. 7114(b)(5) 3
5 U.S.C. 7114(c) 9
5 U.S.C. 7116(a) 9
5 U.S.C. 7116(b)(7) 4
5 U.S.C. 7117(a) 4, 37
5 U.S.C. 7117(c) 9
5 U.S.C. 7119(b) 4
5 U.S.C. 7119(b)(1) 4
5 U.S.C. 7119(c) 4
5 U.S.C. 7119(c)(5) 47
5 U.S.C. 7119(c)(5)(A) 4
5 U.S.C. 7119(c)(5)(B) 4
5 U.S.C. 7119(c)(5)(C) 4
5 U.S.C. 7123(a) 3
5 U.S.C. 7123(b) 3

5 U.S.C. 7135(b) 27
28 U.S.C. 1254(1) 2
29 U.S.C. 158(d) 29, 30
Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978) 2
Executive Order No. 10988, 3 C.F.R. 521 (1959-1963 comp.) 2
Executive Order No. 11491, 3 C.F.R. 861 (1966-1970 comp.), as amended by Exec. Orders Nos. 11616, 11636, and 11838, 3 C.F.R. 605, 634, 957 (1971-1975 comp.) 2, 26
Miscellaneous:
124 Cong. Rec. 29198 (1978) 25
Joint Explanatory Statement of the Committee on Conference, H.R. 1717, 95th Cong., 2d Sess. 127 (1978) 24
S. Rep. No. 969, 95th Cong., 2d Sess. 104 (1978) .. 24
2A Sutherland, Statutory Construction, 47.34 (5th ed. 1992) 13

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BRIEF FOR THE PETITIONER FEDERAL LABOR RELATIONS AUTHORITY

OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1a-10a) is reported at 132 F.3d 157.[1] The decision and order of the Federal Labor Relations Authority (Pet. App. 11a-23a) is reported at 52 FLRA 475.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1997. The petition for a writ of certiorari in Case No. 97-1184 was filed on January 15, 1998, and the petition for a writ of certiorari in Case No. 97-1243 was filed on January 28, 1998. This Court granted certiorari and consolidated the cases on June 1, 1998. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101-7135 (1994 & Supp. II 1996) are reproduced in the appendix to the petition in Case No. 97-1184 (Pet. App. 24a-36a).

STATEMENT

A. The Federal Service Labor-Management Relations Statute

The Federal Service Labor-Management Relations Statute ("the Statute") governs labor-management

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[1]Pet. App. refers to the Appendix in the petition for a writ of certiorari filed in Case No. 97-1184.

relations in the federal service.[2] Under the Statute, the responsibilities of the Federal Labor Relations Authority ("the Authority") include adjudicating unfair labor practice complaints, negotiability disputes, bargaining unit and representational election matters, and resolving exceptions to arbitration awards. *See* 5 U.S.C. 7105(a)(1), (2); *see also Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 93 (1983) (*BATF*). The Authority performs a role analogous to that of the National Labor Relations Board ("NLRB") in the private sector. *See BATF*, 464 U.S. at 92-93; *Federal/Postal/Retiree Coalition* v. *Devine*, 751 F.2d 1424, 1430 (D.C. Cir. 1985). Congress intended the Authority, like the NLRB, "to develop specialized expertise in its field of labor relations and to use that expertise to give content to the principles and goals set forth in the [Statute]." *BATF*, 464 U.S. at 97.

With exceptions not relevant here, any person, including a federal agency employer, who is aggrieved by a final order of the Authority may seek judicial review in the United States court of appeals "in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia." 5 U.S.C. 7123(a). The Authority may petition for enforcement of its orders in appropriate courts of appeals. *See* 5 U.S.C. 7123(b).

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[2]The Statute was enacted as Section 701 of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978). Prior to the enactment of the Statute, labor-management relations in the federal service were governed by a program established in 1962 by Executive Order No. 10988, 3 C.F.R. 521 (1959-1963 comp.). The Executive Order program was revised and continued by Executive Order No. 11491, 3 C.F.R. 861 (1966-1970 comp.), as amended by Executive Orders Nos. 11616, 11636, and 11838, 3 C.F.R. 605, 634, 957 (1971-1975 comp.).

The instant case concerns the extent of an agency employer's obligation to bargain with the exclusive representative of its employees. Under the Statute, an agency must bargain in good faith with the exclusive representative of an appropriate bargaining unit about unit employees' conditions of employment and, upon the request of either party, execute a document embodying the agreed upon terms. 5 U.S.C. 7103(a)(12), 7114(b)(2), 7114(b)(5). The Statute defines "conditions of employment" as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions . . . ." 5 U.S.C. 7103(a)(14). However, there is no duty to bargain over contract language that would bring about an inconsistency with a federal law, government-wide rule or regulation, or an agency regulation for which a "compelling need" exists. 5 U.S.C. 7117(a). The obligation to bargain in good faith under the Statute does not require the agency to agree to a proposal or to make a concession. 5 U.S.C. 7103(a)(12); *see Department of Defense* v. *FLRA*, 659 F.2d 1140, 1147 (D.C. Cir. 1981) (*Department of Defense*).

Where the collective bargaining process between an agency and a union fails to resolve an issue, the Statute provides for resolution through the Federal Service Impasses Panel ("Impasses Panel").[3] 5 U.S.C. 7119(b); *see Council of Prison Locals* v. *Brewer*, 735 F.2d 1497, 1499 (D.C. Cir. 1984) (*Council of Prison Locals*). The Impasses Panel is made up of at least seven presidential appointees, and is charged with the responsibility of settling bargaining impasses. 5 U.S.C. 7119(c). Either party may request the Impasses Panel to conduct an

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[3]Strikes in the federal sector are forbidden under 5 U.S.C. 7116(b)(7).

inquiry into a bargaining impasse. 5 U.S.C. 7119(b)(1). The Impasses Panel investigates the impasse and offers recommendations or assistance to resolve the deadlock. 5 U.S.C. 7119(c)(5)(A). If the parties still cannot reach a settlement, the Impasses Panel may hold hearings and take whatever action is necessary and not inconsistent with the Statute to resolve the impasse. 5 U.S.C. 7119(c)(5)(B). When the Impasses Panel imposes a term on the parties, it is "binding on such parties during the term of the agreement, unless the parties agree otherwise." 5 U.S.C. 7119(c)(5)(C). The Impasses Panel does not have authority to pass judgments on assertions of nonnegotiability. The resolution of negotiability issues are made by the Authority. *See American Fed'n of Gov't Employees* v. *FLRA*, 778 F.2d 850, 854 (D.C. Cir. 1985) (*AFGE* v. *FLRA*).

B. The Instant Case

1. Factual Background

This case is the most recent of a series of cases decided by the Authority and the courts of appeals concerning the extent of a federal agency employer's obligation to negotiate over union-initiated proposals offered during the term of a collective bargaining agreement. The National Federation of Federal Employees, Local 1309 ("NFFE" or "union") is the exclusive bargaining representative for a unit of employees at the U.S. Geological Survey, Reston, Virginia ("Survey"), an activity of the United States Department of the Interior (Pet. App. 12a-13a). During negotiations of a collective bargaining agreement, the union offered the following proposal:

> Article 7. Section 2.b. Union-initiated Bargaining. The Union may request and the Employer will be

> obliged to negotiate on any negotiable matters not covered by the provisions of this agreement.

(Pet. App. 12a). The Survey refused to negotiate over the proposal, contending that the proposal was not within its statutory duty to bargain (Pet. App. 13a).

In response, NFFE filed an unfair labor practice charge with the Authority. As relevant here, the Authority held that the proposal was within the Survey's obligation to bargain and that the Survey committed unfair labor practices when it refused to negotiate over the proposal (Pet. App. 17a-19a). Under the Statute, it is an unfair labor practice to refuse to bargain over a proposal that is substantially identical to one previously found negotiable by the Authority (Pet. App. 16a). The Authority found that the proposal at issue was substantially identical to one found within the obligation to bargain in *Merit Sys. Protection Bd. Prof'l Ass'n and Merit Sys. Protection Bd., Washington, D.C.*, 30 FLRA 852 (1988) (*MSPB*) (Pet. App. 16a-17a). Further, the Authority rejected the Survey's arguments that the union's proposal was inconsistent with the Statute (Pet. App. 17a-18a).

On review, the Fourth Circuit reversed the Authority, finding that union-initiated bargaining during the term of a collective bargaining agreement is "contrary to the Statute" (Pet. App. 6a). The Fourth Circuit's decision was written against an extensive background of conflicting administrative and judicial precedent. Because the court's decision can best be understood in this context, a history of the relevant precedent is provided prior to analyzing the court's opinion in the instant case.

2. Relevant Administrative and Judicial Precedent

a. The D.C. Circuit's Decision in *NTEU* v. *FLRA*

The Authority first considered an agency's obligation to bargain over union-initiated midterm proposals in *Internal Revenue Serv.*, 17 FLRA 731 (1985) (*IRS I*). There the Authority determined that Congress intended to limit the obligation to bargain over union-initiated proposals to situations where the parties were negotiating a comprehensive term collective bargaining agreement. *Id.* at 735-36.

On review, the D.C. Circuit set aside the Authority's decision and remanded the case to the Authority. *National Treasury Employees Union* v. *FLRA*, 810 F.2d 295 (D.C. Cir. 1987) (*NTEU* v. *FLRA*). Relying on private sector precedent and congressional intent to encourage and promote collective bargaining in the federal sector, the court held that the obligation to bargain under the Statute extends to union-initiated midterm proposals. *Id.* at 301. The court found that the Statute does not distinguish midterm bargaining from any other type of bargaining in terms of the mutual obligation to negotiate in good faith. *Id.* Further, the court stated that, when enacting the Statute, Congress was aware of "clear and long-established [private sector] precedent that the duty to bargain extends also to midterm proposals initiated by either management or labor, provided the proposals do not conflict with the existing agreement." *Id.* at 299 (citing *Jacobs Mfg. Co.*, 94 NLRB 1214 (1951), *enforced*, 196 F.2d 680 (2d Cir. 1952)).

On remand, the Authority adopted the reasoning of the D.C. Circuit and held that an agency is obligated to

bargain during the term of a collective bargaining agreement on negotiable union proposals concerning matters not contained in or covered by the term agreement unless the union has waived its right to bargain about the subject matter involved. *Internal Revenue Serv.*, 29 FLRA 162, 166 (1987) (*IRS II*). The D.C. Circuit subsequently denied a suggestion for initial hearing *in banc* filed by the Internal Revenue Service after the Authority sought enforcement of its order in *IRS II*. *FLRA* v. *Internal Revenue Serv.*, 838 F.2d 567 (D.C. Cir. 1988) (*FLRA* v. *IRS*). In a concurring opinion to the *per curium* denial, Judge Edwards, joined by Judge Silberman, endorsed the Authority's conclusions and rationale concerning the right to engage in midterm bargaining, specifically stating that the Authority properly applied private sector precedent. *Id.* at 568-69.

b. The Fourth Circuit's Decision in *SSA* v. *FLRA*

After *IRS II*, the Authority continued to hold that agency employers are obligated to bargain over union-initiated midterm proposals. *See, e.g., Missouri Nat'l Guard, Office of the Adjutant Gen., Jefferson City, Missouri*, 31 FLRA 1244 (1988). However, the Authority's construction of this aspect of the Statute was challenged in the Fourth Circuit in *Social Security Admin.* v. *FLRA*, 956 F.2d 1280 (4th Cir. 1992) (*SSA* v. *FLRA*). The Fourth Circuit expressly disagreed with the reasoning of the Authority and the D.C. Circuit, concluding that "union-initiated midterm bargaining is not required by the [S]tatute and would undermine the congressional policies underlying the [S]tatute." *Id.* at 1281. The court, on examining the text of the Statute and its legislative history, concluded that the mutual obligation to bargain in good faith "arises as to only one, basic agreement." *Id.* at 1284-85. Further, the Fourth

Circuit stated that the Authority's reliance on private sector precedent was inappropriate in this context. *Id.* at 1286-88. Finally, the court held that midterm bargaining undermined the Statute's goal of promoting an effective and efficient government. *Id.* at 1288-90.

Despite the Fourth Circuit's decision, the Authority adhered to its view expressed in *IRS II* that the duty to bargain extends to union-initiated midterm proposals. *See, e.g., Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 45 FLRA 1290 (1992); *U. S. Patent and Trademark Office*, 45 FLRA 1090 (1992), *rev'd*, 991 F.2d 790 (4th Cir. 1993) (Table).

c. The Fourth Circuit's Decision in *Energy* v. *FLRA*

In *U. S. Department of Energy, Washington, D.C.*, 51 FLRA 124 (1995) (*Department of Energy*), the Authority, and in turn the Fourth Circuit, were presented with the issue of midterm bargaining in a new context. In resolving a bargaining impasse, the Impasses Panel imposed the following provision in a contract between a subordinate activity of the Department of Energy and the exclusive representative of the activity's employees:

> The Employer will be obligated to bargain in good faith on any negotiable Union-initiated proposals concerning matters that are not contained in or covered by the collective-bargaining agreement, unless the Union has waived its right to bargain about the subject matter involved.

51 FLRA at 125. On review of the contract, the Department of Energy disapproved the provision as being contrary to law, citing *SSA* v. *FLRA*. *Id.* The union filed an unfair labor practice charge with the

Authority, contending that the agency's disapproval was improper.[4] *Id.* at 124.

On alternative grounds, the Authority rejected the Department of Energy's assertion that, under the authority of *SSA* v. *FLRA*, the disputed provision was contrary to law. *Id.* at 127-28. First, the Authority found that *SSA* v. *FLRA* addressed only whether, apart from any contractual obligation, an agency is mandated under the Statute to engage in midterm bargaining. *Id.* at 127. *SSA* v. *FLRA* did not address the negotiability of a contract provision for union-initiated midterm bargaining. Thus, in the Authority's view, *SSA* v. *FLRA* did not compel a finding that the contractual provision was inconsistent with law. *Id.* at 127-28. The Authority then concluded that the provision was not inconsistent with any provision of applicable law, rule, or regulation. *Id.* at 129.

Alternatively, the Authority noted that it had respectfully declined to follow the Fourth Circuit's *SSA* v. *FLRA* decision and has continued to hold that agencies are required under the Statute to engage in midterm bargaining over union-initiated proposals. *Id.* at 127 n.4. Accordingly, the Authority found that although the negotiability of the provision did not depend on finding a statutory obligation to bargain midterm, the proposal did restate the statutory obligation and was negotiable on that ground as well. *Id.* at 128 n.5 (citing *MSPB*, 30 FLRA at 859-60 (1988)).

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[4]Under section 7114(c) of the Statute, the agency head may review a collective bargaining agreement to assure that its provisions are consistent with applicable law, rule, or regulation. 5 U.S.C. 7114(c). A union may contest an agency head's disapproval as a negotiability appeal under section 7117(c) of the Statute or as an unfair labor practice under section 7116(a). 5 U.S.C. 7116(a), 7117(c). *See AFGE* v. *FLRA*, 778 F.2d at 855-56.

The Fourth Circuit granted the Department of Energy's petition for review and reversed the Authority's decision. *Department of Energy* v. *FLRA*, 106 F.3d 1158 (4th Cir. 1997) (*Energy* v. *FLRA*). Although recognizing that the question of whether the Statute imposes a duty differs from the question of whether an agency must bargain regarding a clause in a collective bargaining agreement, the court found that midterm bargaining is inconsistent with the Statute because it is "at odds with the policies underlying [the Statute] and is wholly contrary to congressional intent." *Id.* at 1164. The court further held that finding the provision at issue negotiable "would effectively vitiate [*SSA* v. *FLRA*]." *Id.* at 1163. The court reasoned that because the Impasses Panel adheres to the Authority's interpretation of the Statute concerning the obligation to bargain midterm, it would be unlikely that the Impasses Panel would ever fail to impose a midterm bargaining provision on an agency. *Id.* at 1163-64. Thus, the court concluded, "a union could circumvent [*SSA* v. *FLRA*] by the mere expedient of negotiating to impasse on a midterm bargaining provision." *Id.* at 1164.

3. The Decision of the Court of Appeals in the Instant Case

While *Energy* v. *FLRA* was pending before the Fourth Circuit, but before the case was decided, the Authority issued its decision and order in the instant case (Pet. App. 11a-23a). As noted above (p. 5, *supra*), the agency employer here refused to bargain over a proposal substantially identical to that at issue in *Department of Energy*. Expressly relying on *Department of Energy*, the Authority found that the proposal was consistent with law and within the agency's obligation to bargain (Pet. App. 17a-18a).

Accordingly, the Authority found that the refusal to bargain was an unfair labor practice (Pet. App. 21a).

The Department of the Interior petitioned the Fourth Circuit for review. Finding the case controlled by *SSA* v. *FLRA* and *Energy* v. *FLRA*, the court granted the petition for review and denied the Authority's cross-application for enforcement (Pet. App. 10a). The court found no meaningful distinction between the legality of a midterm bargaining requirement imposed by the Impasses Panel as in *Energy* v. *FLRA*, and an agency's obligation to negotiate over a requirement to bargain midterm (Pet. App. 8a-10a). Accordingly, the court found the union's proposal nonnegotiable (Pet. App. 10a). In so concluding, the court recognized "the difficulties which the conflicting decisions present," but noted that the "recourse for resolution must be sought elsewhere" (Pet. App. 10a).

SUMMARY OF ARGUMENT

This case concerns the extent of an agency employer's obligation under the Statute to bargain over union-initiated midterm proposals. The Authority, the agency charged with administering the Statute, has concluded that the Statute obligates an agency to bargain during the term of a collective bargaining agreement over union-initiated proposals concerning matters not contained in or covered by the agreement. As a consequence, the Authority found in the instant case that during term negotiations an agency was required to bargain over a proposal that would obligate it to bargain over union-initiated proposals offered during the life of the agreement.

The issue of midterm bargaining has been addressed by the D.C. and the Fourth Circuits. Both courts have concluded that the Statute does not expressly address

midterm bargaining. However, after examining the terms of the Statute, its legislative history, and its overall goals and purposes, these courts have reached diametrically opposed conclusions. The D.C. Circuit holds, as the Authority does, that an agency is obligated to bargain over union-initiated midterm proposals. In stark contrast, the Fourth Circuit has ruled that an agency is not required to bargain over union-initiated midterm proposals, and moreover, is prohibited from agreeing to engage in midterm bargaining. The Fourth Circuit's holding that a union may not obtain the right to bargain midterm through the collective bargaining process is an extension of its earlier decision that the Statute does not require midterm bargaining.

I. The Authority's decision in the instant case should be upheld because the Authority has reasonably concluded that the Statute requires an agency to bargain over union-initiated midterm proposals that are not contained in or covered by the existing agreement, and the union's proposal merely restates the statutory obligation. The Authority's conclusion finds significant support in the language of the Statute. Specifically, the Statute provides an expansive duty to bargain over conditions of employment without restrictions with regard to the circumstances under which the obligation arises. *See* 5 U.S.C. 7103(a)(12), 7114(a)(4). In addition, even if the Statute is viewed as silent or ambiguous on the issue of midterm bargaining, the Authority's reasoned view is entitled to deference under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Although recognizing that the Statute, by its terms, does not restrict midterm bargaining, the Fourth Circuit has found "suggestions" that Congress did not mandate union-initiated midterm bargaining. *SSA* v.

FLRA, 956 F.2d at 1284. Not only has that court failed to accord the Authority proper deference in interpreting the Statute, but its own conclusions are based on misreadings of the relevant authorities. The court's specific and selective reliance on a reference in the Statute to "a" collective bargaining agreement in section 7114(a)(4) in concluding that the obligation to bargain extends only to a single basic agreement is contrary to accepted canons of statutory construction providing that, as a rule, terms introduced by "a" apply to multiple entities. *See* 2A Sutherland, Statutory Construction, 47.34 (5th ed. 1992).

Further, nothing in the Statute's legislative history or the precedent under the Executive Order practice which preceded enactment of the Statute support the Fourth Circuit's interpretation of the Statute. The Fourth Circuit mistakenly relies on an ambiguous fragment from the Senate Report that accompanied a bill that was never enacted into law. With respect to the practice under the Executive Order, there is no authoritative precedent that establishes that midterm bargaining was not required under the Order. Further, and in any event, Congress intended that the Authority and the courts would not be bound by Executive Order practice, but were to take a fresh look at federal sector labor relations under the Statute. *See INS* v. *FLRA*, 855 F.2d 1454, 1461 (9th Cir. 1988).

The Authority's interpretation of the Statute is also consistent with well-established private sector precedent developed under the National Labor Relations Act, the legislation upon which the Statute was modeled. An employer's obligation to bargain over union-initiated midterm proposals that are not covered by an existing agreement has been an established part of the fabric of labor law for over 40 years. *See NLRB* v.

Jacobs Mfg. Co., 196 F.2d 680, 683 (2d Cir. 1952); *see also NTEU* v. *FLRA*, 810 F.2d at 300.

Lastly, the Authority's interpretation furthers the Statute's dual goals of encouraging collective bargaining in the federal government and promoting an effective and efficient government. *See* 5 U.S.C. 7101. Requiring agencies to bargain midterm over matters not covered by an existing agreement permits employees to participate through their representatives in important workplace decisions. *See* 5 U.S.C. 7101 (a)(1). Ignoring these considerations, the Fourth Circuit has instead found midterm bargaining to be inconsistent with the Statute's goal of providing for governmental efficiency because it will lead to endless bargaining. The specter of endless bargaining envisioned by the court is contradicted by both the limited nature of mandatory midterm bargaining and the ability of government negotiators to protect the government's interests through the bargaining process. *See FLRA* v. *IRS*, 838 F.2d at 568-69.

II. Alternatively, and as the Authority properly held in the instant case, even if there is no statutory obligation to bargain midterm, nothing in the Statute prevents a union from obtaining the right to bargain midterm through the collective bargaining process. A holding that the Statute does not require an agency to bargain midterm does not imply that midterm bargaining is precluded by the Statute. *See BATF*, 464 U.S. at 107 n. 17. Indeed, if the obligation to bargain under the Statute is to be a meaningful one, it must extend to matters beyond those guaranteed by statute.

The Statute creates a broad obligation to bargain only limited by express statutory exceptions. *See, e.g., Nuclear Regulatory Comm'n* v. *FLRA*, 895 F.2d 152, 154 (4th Cir. 1990). Although the Fourth Circuit has

found midterm bargaining to be "contrary" to the Statute, it has not identified any express statutory provision that prohibits midterm bargaining. Instead, rather than deferring to the Authority on this question as well, the Fourth Circuit has concluded only that midterm bargaining is inconsistent with the statutory purpose of fostering an effective and efficient government.

As noted above, the court has exaggerated the extent to which midterm bargaining affects governmental operations and ignored the fact that midterm bargaining promotes other goals of the Statute. But even assuming midterm bargaining imposes some obligations on agency management, the existence of such burdens is insufficient to place a bargaining proposal outside the agency's obligation to bargain. Collective bargaining proposals by their nature require agencies to take actions or commit resources they might not otherwise have taken or committed.

Finally, although the Fourth Circuit recognizes that nothing in the Statute prohibits an agency from voluntarily engaging in midterm bargaining, the court impermissibly concludes that the agency cannot be required to exercise that discretion prospectively through collective bargaining. It is well established that where an agency has discretion to act with respect to conditions of employment, it has the obligation to bargain over the exercise of that discretion. *See Department of the Treasury, U.S. Customs Serv.* v. *FLRA*, 836 F.2d 1381, 1384 (D.C. Cir. 1988).

ARGUMENT

I. The Authority Properly Determined That an Agency Is Obligated Under the Statute to Bargain over Union-Initiated Midterm Proposals and a Bargaining Proposal That Restates That Obligation Is Negotiable

One of the Authority's bases for finding the union's midterm bargaining proposal negotiable is that an agency is obligated under the Statute to bargain over union-initiated midterm proposals, and the proposal at issue in this case merely restated that preexisting obligation. The Fourth Circuit had previously rejected the Authority's determination that the Statute requires bargaining over union-initiated midterm proposals. As demonstrated below, the Authority's position is supported by the language of the Statute and is consistent with its legislative history. By contrast, the Fourth Circuit's contrary position lacks any statutory support. Moreover, the Authority's position is consistent with relevant private sector precedent and furthers the Statute's purposes and goals. Accordingly, the Court should affirm the Authority's holding that the duty to bargain in good faith under the Statute includes the duty to bargain over union-initiated midterm proposals.[5]

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[5]Because the Fourth Circuit had previously held in *SSA* v. *FLRA* that there was no statutory duty to bargain midterm, the Authority did not argue in the instant case or in *Energy* v. *FLRA* that the union's proposal for midterm bargaining was negotiable because it restated a statutory obligation. Nonetheless, the existence of a statutory obligation remains a ground for the Authority's decision and is properly before the Court. The Fourth Circuit based its decision in *Energy* v. *FLRA* and the instant case on the statutory determinations in *SSA* v. *FLRA*. *See Energy* v. *FLRA*, 106 F.3d at 1163-64 ("our reasoning in [*SSA* v. *FLRA*] compels the conclusion that a clause requiring an agency to engage in union-initiated midterm bargaining is . . . not negotiable"). The Court will address

A. The Authority's Interpretation is Supported by the Language of the Statute and Entitled to Deference

1. The Statute Establishes a Broad Duty to Bargain

Although the Statute does not expressly address midterm bargaining, there is considerable support in its language for the proposition that agencies are obligated to bargain over union-initiated midterm proposals. Indeed, the Statute establishes a broad duty to bargain and imposes no express limits on the circumstances under which the obligation to bargain over negotiable conditions of employment arises.[6]

Specifically, the obligation to bargain, set out in section 7114(a)(4), provides that "an agency and an exclusive representative shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement . . . ." A "collective bargaining agreement" is "an agreement entered into as a result of collective bargaining pursuant to the provisions of [the

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an issue that is a "predicate to an intelligent resolution of the question presented." *Caterpillar, Inc.* v. *Lewis*, ___ U.S. ___, 117 S. Ct. 467, 476 n.13 (1996). Accordingly, the Authority presses the statutory argument here and is entitled to do so. *See United States* v. *Williams*, 504 U.S. 36, 44-45 (1992) (petitioner may raise matter where it had done so in case relied upon by the lower court and did not concede in the current case the correctness of that precedent).

Moreover, resolution of the underlying statutory question is necessary to finally resolve a significant and recurring issue in federal sector labor relations. *See City of St. Louis* v. *Praprotnick*, 485 U.S. 112, 120-21 (1988) (deciding a question that is important and likely to recur will not undermine the policy of judicial economy).

[6]As will be discussed *infra*, the Statute does limit the *subjects* over which an agency employer is obligated to bargain. But limiting the subjects that can be bargained is different from limiting the circumstances under which an obligation to bargain arises.

Statute]." 5 U.S.C. 7103(a)(8). Collective bargaining means "the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good faith effort to reach agreement with respect to the conditions of employment affecting such employees[.]" 5 U.S.C. 7103(a)(12).[7] Notably, these broadly worded provisions do not exclude midterm bargaining. To the extent the Fourth Circuit has concluded otherwise, it misapprehends the Statute.

2. Deference Is Owed to the Authority's Interpretation

Even if one were to conclude from the absence of an express reference to midterm bargaining that the Statute is silent or ambiguous on the issue, the Authority's well-reasoned position is worthy of deference.[8] Where, as here, the Authority is interpreting the statute that it is charged with implementing, its conclusions are reviewed under the standard set forth in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (*Chevron*). *See Fort Stewart Schools* v. *FLRA*, 495 U.S. 641, 644-45 (1990) (*Fort Stewart Schools*); *see also* 5

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[7]As we discuss (p. 29, *infra*), the Statute's definition of collective bargaining is substantially the same as that found in the National Labor Relations Act.

[8]Both courts to address the issue have noted that the Statute does not mention midterm bargaining *per se*. *See SSA* v. *FLRA*, 956 F.2d at 1284 ("the textual analysis [of the Statute] is not definitive in this case, for the [Statute] does not explicitly discuss union-initiated midterm bargaining"); *see also NTEU* v. *FLRA*, 810 F.2d at 298 (text of the Statute "neither specifies nor distinguishes midterm bargaining, union-initiated bargaining, and any other type of bargaining").

U.S.C. 7105. Under *Chevron*, if the relevant statutory language is clear, the Court "must give effect to the unambiguously expressed intent of Congress." *Fort Stewart Schools*, 495 U.S. at 645 (quoting *Chevron*, 467 U.S. at 842-43). If, on the other hand, the relevant statutory provisions are "silent or ambiguous" on the point at issue, the Court should affirm the Authority's conclusions if they are based on a "permissible construction of the Statute." *Id.*

Deference to the Authority is "especially appropriate" where the Authority is required to fill in any statutory gaps. *Department of Health and Human Servs.* v. *FLRA*, 976 F.2d 1409, 1413 (D.C. Cir. 1992) (citing *Chevron*, 467 U.S. at 843-44). The Authority is to "exercise its special function of applying the general provisions of the [Statute] to the complexities of federal labor relations." *BATF*, 464 U.S. at 97; *see also NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990) (the NLRB must have the authority to fill the interstices of the [illegible]ad statutory provisions) (*Curtin Matheson*).

3. The Fourth Circuit Has Improperly Failed to Defer to the Authority and Has Misinterpreted the Statute

In resolving the midterm bargaining issues, the Fourth Circuit has repeatedly failed to grant the Authority the deference due under *Chevron*.[9] Although

[9]The Authority's position here is entitled to deference even though it formerly held a different one. *See Curtin Matheson*, 494 U.S. at 787; *see also NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 265-66 (1975) ("To hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decision making.").

acknowledging in *SSA* v. *FLRA* that the Statute does not specifically address midterm bargaining, the Fourth Circuit nonetheless reversed the Authority based only on "suggest[ions] that bargaining over midterm union proposals was not mandated by Congress." 956 F.2d at 1284. As we demonstrate below, the "suggestions" the *SSA* v. *FLRA* court found are based on misreadings and misapplications of the relevant authorities. However, even if these suggestions have any merit, under the appropriate standard of review they are insufficient to overcome the Authority's well-reasoned conclusions concerning an agency's obligation to bargain over union-initiated midterm proposals. *See Department of the Treasury* v. *FLRA*, 494 U.S. 922, 928 (1990) (Court must accept the Authority's construction if it is a reasonable one, even though it is not the one the court would have arrived at).

In *SSA* v. *FLRA*, the Fourth Circuit mistakenly finds support for its conclusion that there is no obligation for an agency to bargain over union-initiated midterm proposals from the fact that section 7114(a)(4) refers to "collective bargaining agreement" in the singular. 956 F.2d at 1284. From nothing more than that section's reference to "a" collective bargaining agreement, the court concludes that "the statutory assumption seems to have been that of one comprehensive agreement that serves to ensure workplace stability during its designated term." *Id.* It is an unwarranted leap of logic to infer from the Statute's use of the indefinite article "a," a comprehensive policy pronouncement concerning collective bargaining in the federal government.

In a footnote, the court acknowledges that another section of the Statute references the obligation to negotiate "collective bargaining agreements," but dismisses this section by stating that "we view this

reference merely as a generic statement that contemplates successive, not overlapping labor contracts." *SSA* v. *FLRA*, 956 F.2d at 1284 n.1. However, the court provides no justification for inconsistently viewing the reference to a singular collective bargaining agreement as indicative of significant policy considerations, but the plural reference as merely "a generic statement." In light of the absence of more definitive language, the better view is that all the references to collective bargaining agreements are generic and indefinite with respect to number. *See Johnston* v. *Penrod Drilling Co.*, 803 F.2d 867, 869-70 (5th Cir. 1986) (reference to "a party" in Fed. R. Civ. P. 68 does not limit application to single defendants (citing 1 U.S.C. 1)); *see also* 2A Sutherland, Statutory Construction, 47.34 (5th ed. 1992) ("It is most often ruled that a term introduced by 'a' or 'an' applies to multiple subjects or objects unless there is reason to find that singular application was intended or is reasonable.").

The Fourth Circuit also mistakenly relies upon the "management rights" section of the Statute in support of its conclusions concerning midterm bargaining. That section reserves to agency employers the right to establish certain categories of conditions of employment. 5 U.S.C. 7106(a). The exercise of those rights is, however, subject to the negotiation of "procedures" utilized in the exercise of those authorities, and "appropriate arrangements" for adversely affected employees. 5 U.S.C. 7106(b)(2), (3); *see Department of Defense*, 659 F.2d at 1145-46.

The Fourth Circuit's reliance on section 7106 is flawed in two respects. First, the Fourth Circuit misreads subsections (b)(2) and (3) as establishing a specific and exclusive midterm bargaining right to be exercised only

by agency management. *SSA* v. *FLRA*, 956 F.2d at 1284. Section 7106 is not, however, the source of the Statute's bargaining obligations. Rather, section 7106 establishes an exception to the broad obligation to bargain found in sections 7114 and 7103(a)(12). *See Department of Defense*, 659 F.2d at 1146. Accordingly, subsections 7106(b)(2) and (3) are not independent grants of a right to bargain but are provisos that clarify and/or modify the scope of the reserved management rights found in section 7106(a). *See AFGE, Local 2782* v. *FLRA*, 702 F.2d 1183, 1186-87 (D.C. Cir. 1983) (Opinion by Judge, now Justice, Scalia).[10]

Second, to the extent that section 7106 is relevant at all, it could support the Fourth Circuit's view that midterm bargaining is limited to management initiatives only in those cases where the reserved management rights are at issue. Section 7106 has no effect on the mutual obligation to bargain over conditions of employment not involving management rights.

B. Neither the Statute's Legislative History Nor Practice Under the Predecessor Executive Order Supports the Fourth Circuit's Position

In *SSA* v. *FLRA*, the Fourth Circuit finds its conclusion that midterm bargaining is not required by the Statute "confirmed by the Statute's legislative history." 956 F.2d at 1284. However, the court misconstrued both the legislative history and the

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[10]As the D.C. Circuit noted, the management rights section demonstrates that Congress intended to protect government interests by limiting the subjects of bargaining. There is no indication that Congress also intended to restrict the circumstances under which a bargaining obligation arises. *See NTEU* v. *FLRA*, 810 F.2d at 301.

administrative precedent under the Executive Order that previously governed federal sector labor relations. Specifically, the court has improperly relied on material accompanying the Senate bill, which was rejected in favor of the House version of what became the Statute, and it has overstated the significance of the Executive Order precedent.

1. The Fourth Circuit Misconstrues the Senate Report

Nothing in the Statute's legislative history indicates that Congress intended to prohibit union-initiated midterm bargaining in the federal sector. To the contrary, the Authority's position is fully consistent with Congress's commitment to the "right of Federal employees to organize and bargain collectively, and participate through labor organizations in decisions which affect them . . . ." *Joint Explanatory Statement of the Committee on Conference*, H.R. 1717, 95th Cong., 2d Sess. 127 (1978), *reprinted in* Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978* at 795 (Comm. Print No. 96-7) (*Legis. Hist.*).

The Fourth Circuit improperly relies on a single statement, taken out of context, from the Senate report that accompanied a bill that was not enacted. *See NTEU* v. *FLRA*, 810 F.2d at 299. The Fourth Circuit cited the following passage:

> The parties have a mutual duty to bargain not only with respect to those changes in established personnel policies proposed by management, but also concerning negotiable proposals initiated by

> either the agency or the exclusive representative in the context of negotiations leading to a basic collective bargaining agreement.

SSA v. *FLRA*, 956 F.2d at 1284-85, quoting from S. Rep. No. 969, 95th Cong., 2d Sess. 104 (1978), *reprinted in Legis. Hist.* at 764. According to the court, this passage indicates that an agency's duty to bargain arises in *only* two contexts, *i.e.*, during negotiations leading to a "basic collective bargaining agreement," and in response to management-initiated midterm changes in conditions of employment. *SSA* v. *FLRA*, 956 F.2d at 1285. Contrary to the court's conclusion, this passage does not indicate, let alone establish, congressional intent to prohibit midterm bargaining.

First, as the D.C. Circuit noted, examination of the Senate bill and accompanying report is of limited value because the Conference Committee adopted the House bill as part of an overall statutory scheme to broaden collective bargaining, rather than adopting the more narrow scope of collective bargaining provided under the Senate bill.[11] *NTEU* v. *FLRA*, 810 F.2d at 298-99.

Second, even if reliance on the Senate report would be appropriate, the quoted passage is itself ambiguous and does not establish what the Fourth Circuit claims. In that regard, nowhere in the Statute or the legislative history is the phrase "a basic collective bargaining agreement" defined. Therefore, it cannot be inferred that the authors of this passage intended to limit the mutual obligation to bargain over negotiable proposals to a single term agreement. In addition, the passage

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[11] *See, e.g.*, 124 Cong. Rec. 29198 (1978) (remarks of W. Ford) (scope of bargaining under section 7106 to be substantially broader under Udall substitute than under Exec. Order No. 11,491, its immediate predecessor) *reprinted in Legis. Hist.* at 954.

does not expressly state that there are *only* two circumstances under which a bargaining obligation arises.

In conclusion, this ambiguous fragment of legislative history cannot be relied upon to establish the restrictive view of bargaining found by the Fourth Circuit.

2. The Fourth Circuit Mistakenly Interprets Precedent Established under Executive Order 11,491

The Fourth Circuit also finds support for its conclusion that union-initiated midterm bargaining is not required by the Statute based on the practice under Executive Order 11,491, which governed federal sector labor relations prior to the enactment of the Statute. However, the court's reliance on Executive Order practice is mistaken for two reasons. First, authoritative support is lacking for the proposition that agencies were not obligated to bargain midterm over union-initiated proposals under the Executive Order. Second, even assuming there was no obligation to bargain midterm under the Executive Order, Executive Order precedent is of limited value in interpreting the Statute.

The Federal Labor Relations Council (Council) was the body charged with interpreting and administering Executive Order 11,491, as amended, § 4(b), *reprinted in Legis. Hist.* at 1343 (Executive Order). Significantly, the Council never addressed the issue of whether union-initiated midterm bargaining was required under the Executive Order. The only Executive Order case that specifically addressed union-initiated midterm bargaining involved a ruling of the Assistant Secretary of Labor for Labor-Management Relations (A/SLMR) that was not reviewed by the Council. *Army and Air*

Force Exch. Serv., Capitol Exch. Region Headquarters, Case No. 22-6657(CA), 2 *Rulings on Request for Review* 561 (Ass't Sec'y of Labor 1976). Under section 6 of the Order, the A/SLMR was to decide unfair labor practice complaints, subject to review by the Council. A single unreviewed decision by the A/SLMR does not constitute authoritative precedent concerning Executive Order practice.

In any event, Executive Order practice is of limited value in interpreting the Statute. Congress intended to "allow both the Authority and the courts to disregard the Council's interpretation of the Executive Order." *INS* v. *FLRA*, 855 F.2d 1454, 1461 (9th Cir. 1988) (*INS* v. *FLRA*); *see also NTEU* v. *FLRA*, 691 F.2d 553, 562 n.89 (D.C. Cir. 1982) (the Statute's legislative history evinces a congressional determination not to bind the Authority to decisions made by the Council). Rather, the Authority was directed to "take a fresh and independent approach to federal labor relations." *INS* v. *FLRA*, 855 F.2d at 1461.

In contrast, the Fourth Circuit mistakenly finds a congressional "presumption" to codify Executive Order practices in section 7135(b) of the Statute. *SSA* v. FLRA, 956 F.2d at 1286. However, section 7135(b) was not intended to make Executive Order precedent binding on the Authority or to continue Executive Order practices. *See Department of the Air Force* v. *FLRA*, 877 F.2d 1036, 1041 (D.C. Cir. 1989). Instead, section 7135 was merely "intended to prevent the slate from being wiped clean until the Authority and the courts could interpret the [Statute] in a manner consistent with Congress's intent." *Id.* (quoting from

INS v. *FLRA*, 855 F.2d at 1461).[12] As relevant here, section 7135(b) provides that policies and decisions issued under the Executive Order "shall remain in full force and effect until revised or revoked by the President or unless superseded by specific provisions of [the Statute] or by regulations or *decisions* issued pursuant to [the Statute]." (emphasis added).

C. The Fourth Circuit Improperly Rejected Relevant Private Sector Precedent

1. Private Sector Precedent on Midterm Bargaining Is Relevant to Interpreting the Statute

As the D.C. Circuit emphasized, there is clear and long-standing precedent in the private sector that the duty to bargain extends to midterm proposals initiated by either management or labor, provided the proposals do not conflict with the existing agreement. *See NTEU* v. *FLRA*, 810 F.2d at 299. In finding that agency employers are obligated to bargain over union-initiated midterm proposals, the Authority properly relied on this well-established precedent. *See IRS II*, 29 FLRA at 165; *see also NTEU* v. *FLRA*, 810 F.2d at 300; *FLRA* v. *IRS*, 838 F.2d at 568. As the Authority stated, private sector experience is instructive in fashioning an

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[12]In *SSA* v. *FLRA*, the Fourth Circuit noted that in *IRS I*, the Authority had relied on Executive Order precedent and that although the Authority subsequently repudiated *IRS I*, it never specifically rejected its Executive Order findings. 956 F.2d at 1286. However, in *IRS II* the Authority clearly rejected the reasoning of *IRS I* and stated that previous Authority decisions inconsistent with the conclusion that midterm bargaining was mandatory under the Statute "will no longer be followed." *IRS II*, 29 FLRA at 167. *IRS II* is reasonably read as a total repudiation of *IRS I*.

appropriate standard for midterm bargaining in the federal sector.

In finding that collective bargaining in the federal civil service is in the public interest, Congress specifically noted the "experience in both private and public employment." 5 U.S.C. 7101(a)(1). Further, the analogy between the Statute and the National Labor Relations Act (NLRA) has been recognized by this and other courts. *See BATF*, 464 U.S. at 92-93; *see also Department of Justice* v. *FLRA*, 991 F.2d 285, 289 (5th Cir. 1993); *Library of Congress* v. *FLRA*, 699 F.2d 1280, 1286-87 and n.32 (D.C. Cir. 1983) (*Library of Congress*); *NTEU* v. *FLRA*, 732 F.2d 703, 705 (9th Cir. 1984). These same courts have also cautioned that the analogy is not complete and that the extent to which precedent developed under the NLRA is instructive in interpreting the Statute depends upon the particular statutory provisions and legal concepts at issue. *See, e.g., Library of Congress*, 699 F.2d at 1287. However, the circumstances of this case make private sector practice relevant to the interpretation of the Statute. *See NTEU* v. *FLRA*, 810 F.2d at 299-300.

First, application of private sector precedent is particularly appropriate in the absence of authoritative precedent or legislative history. *See Library of Congress*, 699 F.2d at 1286. Second, private sector precedent is relevant where the statutory provisions at issue are similar. *See, e.g., Turgeon* v. *FLRA*, 677 F.2d 937, 939 (D.C. Cir. 1982); *cf. Karahalios* v. *NFFE*, 489 U.S. 527, 534-37 (1989) (when the Statute explicitly provides an administrative remedy where the NLRA does not, private sector precedent is not applicable).

Both factors favoring the application of private sector precedent are present here. As discussed above, the Statute's legislative history does not provide a definitive

answer to the question of whether an agency is obligated to bargain over union-initiated midterm proposals. Moreover, the Statute defines the obligation to bargain in good faith in substantially the identical manner as does the NLRA.[13]

2. The Fourth Circuit's Rationale for Discounting Private Sector Precedent Is Flawed

The Fourth Circuit disagreed with the Authority and the D.C. Circuit with respect to the applicability of private sector precedent. That court found that "whatever use private-sector labor law may have in other contexts, we do not believe that it is controlling [with respect to union-initiated midterm bargaining]." *SSA* v. *FLRA*, 956 F.2d at 1286. The court proceeded to identify what it considered differences between the Statute and the NLRA that render the transference of private sector labor law "inappropriate." *Id.* at 1287.

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[13] *Compare* section 7103(a)(12) of the Statute (Pet. App. 25a) *with* section 8(d) of the NLRA, 29 U.S.C. 158(d). Although section 8(d) provides for matters applicable only to the private sector, its basic definition of collective bargaining parallels that found in section 7103(a)(12). As relevant here, section 8(d) defines the obligation to bargain collectively as:

> the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

As discussed *infra*, section 8(d), as amended, unlike the Statute, also specifically addresses midterm bargaining.

However, the court's rationale for rejecting the relevant private sector precedent is flawed.

The Fourth Circuit's principal reason for finding reliance on private sector precedent inappropriate is the absence of a provision in the Statute which compares to that portion of section 8(d) of the NLRA limiting the duty to bargain midterm. Section 8(d) provides in part that the duty to bargain in good faith "shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract." 29 U.S.C. 158(d). The court determined that because Congress "intended bargaining rights to be more limited under the [Statute] than under the NLRA, we find it inconceivable that Congress would have omitted the § 8(d) limitation on midterm bargaining had Congress in fact intended [the Statute] to require such bargaining in the first place." *SSA* v. *FLRA*, 956 F.2d at 1287.

The court infers too much from the absence of the section 8(d) limit on midterm bargaining. As initially enacted, the NLRA, like the Statute, provided for a broad obligation to bargain without reference to midterm bargaining. The Court found that obligation to require an employer to bargain, upon request, with its employees' exclusive representative over all terms and conditions of employment whether or not an existing collective bargaining agreement bound the parties as to the subject matter at issue. *See NLRB* v. *Sands Mfg. Co.*, 306 U.S. 332, 342 (1939); *see also NLRB* v. *Jacobs Mfg. Co.*, 196 F.2d 680, 683 (2d Cir. 1952) (*Jacobs Mfg.*). Congress amended section 8(d) in 1947 to specifically limit bargaining during the term of an agreement to

those matters not contained in the agreement. *See Jacobs Mfg.*, 196 F.2d at 683. It is this amendment upon which the Fourth Circuit relies.

Without any textual or legislative history support, the Fourth Circuit concludes, solely from Congress's omission of the section 8(d) exception to midterm bargaining in the Statute, that Congress intended not to permit union-initiated midterm bargaining at all. The court's highly speculative inference is unwarranted. *See Brecht* v. *Abrahamson*, 507 U.S. 619, 632 (1993) (This court is "reluctant to draw inferences from Congress' failure to act."); *see also United States* v. *Wells*, ___ U.S. ___, 117 S. Ct. 921, 929 (1997) ("It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law."). Indeed, one could equally speculate that the absence of language in the Statute comparable to the section 8(d) exception signaled Congress's intent to permit unrestricted midterm bargaining as had been the case under the NLRA before the amendment to section 8(d).

Further, the Fourth Circuit's reference to "more limited" bargaining rights under the Statute is misplaced. Federal sector bargaining rights are limited by the reserved management rights found in section 7106(a) of the Statute. However, section 7106 does not limit the circumstances under which a bargaining obligation may arise — only the subject matters appropriate for bargaining. The fact that certain mandatory subjects of bargaining in the private sector are nonnegotiable in the federal sector has no bearing on the wholly distinct question of the timing of negotiations.[14]

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[14]Somewhat inconsistently, in another part of its opinion the Fourth Circuit recognized the distinction between limiting the topics subject to bargaining (*i.e.* the scope of bargaining) and limiting

3. The Authority Reasonably Adopted Private Sector Limitations on Midterm Bargaining

On finding no specific statutory warrant for the Authority's "contained in or covered by" limitation on midterm bargaining, the *SSA* v. *FLRA* court stated that the Authority "acted beyond its authority" by grafting this exception on to the midterm bargaining obligation in the federal sector. 956 F.2d at 1289. The court impermissibly limits the Authority's role in this regard.

The Authority properly developed reasonable and workable rules required to implement the general provisions of the Statute concerning the obligation to bargain in good faith. Under section 7105(a)(1) of the Statute, the Authority is charged with "provid[ing] leadership in establishing policies and guidance relat[ed] to matters under the [Statute]." In exercising this role the Court has noted that the Authority is to "give content to the principles and goals set forth in the [Statute]" and apply "the general provisions of the Statute to the complexities of federal labor relations." *BATF*, 464 U.S. at 444; *see also Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, 500-501 (1978) (for the NLRB to accomplish its task of applying the NLRA's general language to specific circumstances, "it must have authority to formulate rules to fill the interstices of the broad statutory provisions"). Moreover, were the Authority not permitted to fill the statutory gaps with reasonable policies and practices, the absence of specific language in the Statute limiting midterm bargaining would lead to unconstrained midterm bargaining as

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the timing of negotiations when it rejected the argument that by broadening the scope of bargaining from the Executive Order, Congress also intended to broaden the circumstances under which the obligation to bargain arises. *SSA* v. *FLRA*, 956 F.2d at 1285.

existed under the NLRA before 1947, a result arguably at odds with the stated purposes of the Statute.

D. The Authority's Holding Furthers the Purposes and Goals of the Statute

Applying the rule derived from the private sector, the Authority held that the duty to bargain in good faith imposed by the Statute requires an agency to bargain during the term of a collective bargaining agreement on negotiable union proposals concerning matters that are not contained in the agreement, unless the union has waived its right to bargain about the subject matter involved. *IRS II*, 29 FLRA at 166. As demonstrated above, the Authority's holding is consistent with the language of the Statute, its legislative history, and analogous precedent developed in the private sector under the NLRA. Further, the Authority's position is consistent with the purposes and goals of the Statute.

Congress found that collective bargaining furthers stability by allowing employees to participate through labor organizations in workplace decisions that affect them, and facilitates and encourages the settlement of disputes between employees and their employers involving conditions of employment. 5 U.S.C. 7101(a). As this Court has recognized regarding the private sector, collective bargaining does not end with the negotiation of a term agreement, but is a continuing process. *Conley* v. *Gibson*, 355 U.S. 41, 46 (1957) (Collective bargaining involves day-to-day adjustments in the contract and "resolution of problems not covered by existing agreements."). Indeed, workplace stability is enhanced by the flexibility to deal with unforeseen contingencies that may arise during the term of an agreement. *See NL Industries* v. *NLRB*, 536 F.2d 786, 790 n.5 (8th Cir. 1976).

The Fourth Circuit, however, ignores these considerations and instead finds that midterm bargaining would contravene the Statute's goal of providing an effective and efficient government (citing 5 U.S.C. 7101(b)). The court reaches this conclusion by finding that government stability and efficiency would be adversely affected by midterm bargaining because it would expose government agencies to an endless bargaining obligation that would result in the continuous expenditure of resources. *SSA* v. *FLRA*, 956 F.2d at 1288.

The Fourth Circuit errs by failing to recognize the limited scope of the midterm bargaining obligation and the ability agency managers have to protect the government's interests through the bargaining process. The obligation to bargain midterm extends only to matters not contained in or covered by the term agreement. *IRS II*, 29 FLRA at 166; *see also U.S. Dep't of Health and Human Servs., Social Sec. Admin., Baltimore, Md.*, 47 FLRA 1004, 1018 (1993) (*DHHS*). Agency management can protect itself against an extended midterm bargaining obligation by ensuring that the term agreement is comprehensive in scope.[15] Any matter not contained in or covered by the agreement that was nonetheless fully explored and discussed during term negotiations would similarly be removed from the scope of allowable midterm bargaining. *See IRS II*, 29 FLRA at 167.

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[15]The Authority has recently clarified its application of the "contained in or covered by" doctrine. *DHHS*, 47 FLRA at 1016-18. A matter is contained in or covered by an existing agreement if the matter is: (1) expressly contained in the existing agreement; or (2) inseparably bound up with and thus plainly an aspect of a subject expressly covered by the agreement. *Id.* at 1018.

Contrary to the Fourth Circuit's suggestion, the union does not have the ability to either limit or control the breadth of negotiations. Management negotiators have the right to raise any and all negotiable issues at term bargaining. *See AFGE, Interdepartmental Local 3723, AFL-CIO*, 9 FLRA 744, 754-55 (1982), *aff'd* 712 F.2d 640 (D.C. Cir. 1983) (union commits unfair labor practice when it refuses to bargain over mandatory subject of bargaining). If either party refuses to agree to include a negotiable matter in the collective bargaining agreement the services of the Impasses Panel can be invoked to resolve the impasse. Agencies are also free to negotiate broad "zipper" clauses through which unions contractually agree to generally waive their right to initiate midterm bargaining or to bargain other provisions restricting negotiations on particular issues. *IRS II*, 29 FLRA at 166-167.[16]

In sum, "[f]ederal agency employers who wish to avoid continuous bargaining during the term of an agreement are free, just as are their private sector counterparts, to negotiate contract provisions to ensure this result." *FLRA* v. *IRS*, 838 F.2d at 570 (concurring opinion of Edwards, J.). The concerns of employer agencies and the Fourth Circuit in this regard "raise nothing more than a tempest in a teapot." *Id.*

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[16]The Fourth Circuit suggested that "zipper clauses" are not an adequate solution to the "problem" because the Authority had not declared them to be mandatory bargaining subjects. *SSA* v. *FLRA*, 956 F.2d at 1288. Although the Authority has not had that specific question before it, it expressed no reservations about the availability of zipper clauses in *IRS II*. Further, the concurring judges in *FLRA* v. *IRS* have opined that, just as in the private sector, zipper clauses would be mandatory subjects of negotiation in the federal sector. 838 F.2d at 570.

II. Even If There Is No Statutory Obligation to Bargain Midterm, a Contract Provision Providing for Midterm Bargaining Is Negotiable Because It Is Not Inconsistent with Applicable Law, Rule, or Regulation

For the reasons provided above, the Court should hold that an agency is obligated to bargain over union-initiated proposals that are not contained in or covered by the term agreement. But, even if the Fourth Circuit's *SSA* v. *FLRA* decision is correct in holding that the Statute does not require an agency to bargain over union-initiated midterm proposals, it erred in its subsequent decisions in *Energy* v. *FLRA* and the instant case where it held that a union cannot acquire the right to bargain midterm through the bargaining process itself.

Under section 7117(a) of the Statute, an agency employer is obligated to bargain over all conditions of employment unless the bargaining proposal is inconsistent with law, a government-wide regulation, or an agency regulation for which a compelling need exists. The Fourth Circuit, as well as other courts of appeals, has recognized that the Statute imposes a "broadly defined and expansive duty to bargain over conditions of employment that is subject only to the express statutory exceptions." *Nuclear Regulatory Comm'n* v. *FLRA*, 895 F.2d 152, 154 (4th Cir. 1990) (internal citations omitted); *see also Library of Congress*, 699 F.2d at 1285; *Department of the Navy, Military Sealift Command* v. *FLRA*, 836 F.2d 1409, 1413 (3d Cir. 1988); *IRS* v. *FLRA*, 717 F.2d 1174, 1176 (7th Cir. 1983); *Navy Public Works Ctr., Pearl Harbor, Honolulu, Hawaii* v. *FLRA*, 678 F.2d 97, 98 (9th Cir. 1982).

As the Authority correctly held, a contractual proposal requiring that the agency bargain over union-

initiated proposals concerning matters not contained in or covered by the term agreement does not fall within an express statutory exception to the bargaining obligation, *i.e.*, it is not inconsistent with any law, government-wide regulation or agency rule for which a compelling need exists. Accordingly, it is within the agency's obligation to bargain. Neither the Fourth Circuit's decision in *SSA* v. *FLRA*, nor any reasonable extension of that decision, compels a different result.[17]

A. The Obligation to Bargain Is Not Delimited by the Rights Granted under the Statute

It is well established that an agency may be obligated to bargain over matters beyond those guaranteed by the Statute. For example, in *National Treasury Employees Union and U.S. Dep't of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Washington, D.C.*, 43 FLRA 1442 (1992), *remanded on other grounds*, 30 F.3d 1510 (D.C. Cir. 1994), the Authority found negotiable a proposal that provided that agency investigators advise employees of representational rights under section 7114(a)(2)(B) of the Statute. There the Authority expressly rejected the agency's claim that the proposal was nonnegotiable because it provided rights to employees that exceeded those granted in the Statute. 43 FLRA at 1445; *see also Department of the Air Force, Scott Air Force Base, Ill.*, 34 FLRA 1129, 1136 (1990) (although union does not have statutory right to advertise in agency-controlled newspaper, it

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[17]In rejecting the Authority's reasonable conclusion that the proposal in question is not inconsistent with law, the Fourth Circuit again fails to grant the Authority appropriate deference. *See Fort Stewart Schools*, 495 U.S. at 644-45. The determination of whether the union's proposal is negotiable wholly involves the interpretation of the Authority's organic statute.

may establish such a right through contract); *United States Dep't of Health and Human Servs.* v. *FLRA*, 976 F.2d 229 (4th Cir. 1992) (collective bargaining agreement or past practice can extend union rights to workplace communication beyond that guaranteed by Statute). Indeed, were the universe of bargainable matters limited to preexisting statutory entitlements, the right to engage in collective bargaining under the Statute would be rendered meaningless.

That a union may bargain for rights in excess of those provided by law has also been recognized by this Court. In finding that the Statute did not entitle union negotiators to travel and per diem payments, the Court stated that "unions may presumably negotiate for such payments in collective bargaining." *BATF*, 464 U.S. at 107 n.17. Subsequent to *BATF*, the Authority found travel and per diem for union negotiators to be negotiable because it was not inconsistent with applicable law or regulation. *See National Treasury Employees Union and Dep't of the Treasury, U.S. Customs Serv.*, 21 FLRA 6, 7 (1986), *enforced*, 836 F.2d 1381 (D.C. Cir. 1988).

This case is in the same posture. A holding that the Statute does not require an agency to bargain over union-initiated midterm proposals does not imply — much less dictate — that midterm bargaining is precluded by the Statute. However, as discussed immediately below, the Fourth Circuit incorrectly went on to find that any union-initiated midterm bargaining is "contrary to the [Statute]." (Pet. App. 6a (citing *Energy* v. *FLRA*, 106 F.3d at 1163)).

B. Union-Initiated Midterm Bargaining Is Not Inconsistent with Law or Applicable Regulation

In *Energy* v. *FLRA*, which formed the basis of the court of appeals' decision in the instant case, the Fourth Circuit held that a proposal providing for union-initiated bargaining during the term of the agreement is outside the agency's obligation to bargain. 106 F.3d at 1158-59. The *Energy* v. *FLRA* court found that: 1) its decision in *SSA* v. *FLRA* held not only that midterm bargaining is not mandated by the Statute, but that it is contrary to the Statute; 2) finding midterm bargaining to be negotiable would "effectively vitiate [*SSA* v. *FLRA*]" because in the event of an impasse, the Impasses Panel would always impose a clause requiring midterm bargaining; and 3) a proposal is nonnegotiable if it is "at odds with the policies underlying a statute" even if the proposal does not contravene a specific statutory provision. 106 F.3d at 1163-64. The Fourth Circuit is in error on each of these findings. Finally, in the instant case, the court recognizes that there is no legal impediment to an agency engaging in midterm bargaining (Pet. App. 9a, 10a). The court, however, implausibly holds that while an agency may participate in midterm bargaining on a case-by-case basis, it may not agree to do so in advance through the collective bargaining process.

1. A Bargaining Proposal Providing for Union-Initiated Midterm Bargaining Is Not Inconsistent with the Statute

As discussed above, the Fourth Circuit erred when it determined that midterm bargaining is not mandated by the Statute. Nonetheless, the Fourth Circuit panels in *Energy* v. *FLRA* and the instant case have compounded

the error by extending *SSA* v. *FLRA* to prohibit unions from negotiating for the right to bargain midterm. Although the *SSA* v. *FLRA* court stated that midterm bargaining was "contrary" to the Statute, it said so only in the context of the statutory question. That court was not addressing the question of whether midterm bargaining could be negotiable.

The Fourth Circuit errs in extending the holding in *SSA* v. *FLRA* — that midterm bargaining would frustrate stability and government efficiency — into the negotiability context. In so doing, the Fourth Circuit has conflated a bargaining proposal's desirability with its negotiability.

As argued above (pp. 35-36), the Fourth Circuit's policy arguments greatly exaggerate the extent to which the availability of midterm bargaining would, in fact, hamper government operations. Further, the court fails to recognize that midterm bargaining furthers other purposes of the Statute — specifically, the protection of the right of employees to bargain collectively and participate through labor organizations in decisions which affect them. 5 U.S.C. 7101(a)(1). But even assuming that union-initiated midterm bargaining imposes some burdens on agency operations, such burdens would not render the matter nonnegotiable. *See AFGE, Local 1698 and U.S. Dep't of the Navy, Naval Aviation Supply Office, Philadelphia, Pa.*, 38 FLRA 1016, 1025-26 (1990) (agency's interest in economy to be protected through collective bargaining); *see also Federal Employees Metal Trade Council, AFL-CIO* v. *FLRA*, 778 F.2d 1429, 1432 (9th Cir. 1985) (balancing competing interests of employees and agency is what collective bargaining is intended to do).

Meaningful bargaining would be severely restricted and undermined if proposals were removed from the

scope of bargaining merely because they impose some burden on agency management. Collective bargaining proposals by their nature require that the agency take some action, or commit resources — oftentimes in a manner that the agency would not have chosen absent the requirements of the proposal. *See National Fed'n of Fed. Employees, Local 2099 and Dep't of the Navy, Naval Plant Representative Office, St. Louis, Mo.*, 35 FLRA 362, 368 (1990) ("To conclude that a proposal or provision [is nonnegotiable] simply because it requires an agency to take some action would completely nullify the obligation to bargain because no obligation of any kind could be placed on management through negotiations.").

Considerations such as increased agency costs and disruption concern the merits or desirability of a proposal, not a proposal's negotiability. Negotiability determinations concern only whether a proposal is inconsistent with law or regulation, not whether a proposal is one that ought to be implemented. *See Department of Defense*, 659 F.2d at 1157. The agency is free to resist the adoption of any proposal it finds undesirable through the collective bargaining process. *See U.S. Naval Ordnance Station, Louisville, Kentucky* v. *FLRA*, 818 F.2d 545, 551 n.7 (6th Cir. 1987) (*Naval Ordnance Station*) (finding a proposal negotiable does not mandate its adoption). As the D.C. Circuit has stated, agency negotiators are presumably capable of protecting agency interests at the bargaining table. *Department of Defense*, 659 F.2d at 1157. The collective bargaining system established by Congress is not one where the duty to bargain exists only when consistent with the agency's convenience or desires. *AFGE* v. *FLRA*, 785 F.2d 333, 338 (D.C. Cir. 1986).

2. The Fourth Circuit's Concern that Permitting Unions to Negotiate for Midterm Bargaining Would Effectively Vitiate *SSA* v. *FLRA* Will Be Rendered Moot by a Meaningful Resolution of this Case

A central feature of the Fourth Circuit's decision in *Energy* v. *FLRA* is its conclusion that permitting unions to negotiate for midterm bargaining rights would "effectively vitiate [*SSA* v. *FLRA*]." 106 F.3d at 1163-64. The Fourth Circuit reasoned that "because the Impasses Panel adheres to the position of the Authority that the [agency] has a statutory duty to engage in midterm bargaining," the Impasses Panel will always impose a midterm bargaining clause. *Id.* at 1163-64. Thus, the *Energy* v. *FLRA* court concluded that "a union could circumvent [*SSA* v. *FLRA*] by the mere expedient of negotiating to impasse on a midterm bargaining provision." *Id.* at 1164. The court's concerns are, however, unwarranted.

In the first place, the Fourth Circuit's prediction that the Impasses Panel will always impose a midterm bargaining proposal has not proven to be the case.[18] But more significantly, whatever validity the court's concern may have once had, it disappears once the current conflict in the circuits is meaningfully resolved. Obviously, if the Court concludes that there is a statutory duty to bargain midterm, the question of impasse and Impasses Panel involvement effectively becomes moot. Should the Court conclude that there is

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[18]The Impasses Panel has, in at least one instance, declined to impose midterm bargaining proposals, leaving the parties to address differences over the extent of the relevant statutory rights. *Department of Health and Human Servs., Social Security Admin., Office of Hearings and Appeals, Falls Church, Va. and Nat'l Treasury Employees Union*, 94 FSIP 47 (Aug. 3, 1994).

no statutory obligation to bargain midterm, but find that the matter is negotiable, then the Impasses Panel could no longer impose such a provision simply because it is a statutory requirement. Rather, the Impasses Panel would resolve any impasse over midterm bargaining on the merits of the individual case. *See Council of Prison Locals*, 735 F.2d at 1499; *see also National Treasury Employees Union Chapter 83 and Dep't of the Treasury, Internal Revenue Serv.*, 35 FLRA 398, 415 (1990) (citing *Veterans Admin. Med. Ctr., Tampa, Florida* v. *FLRA*, 675 F.2d 260, 265 n.9 (11th Cir. 1982)) (the Impasses Panel considers each impasse on its particular facts, and considers the "reasonableness" of the proposals at issue in determining what contract language will be imposed).[19]

3. The Court of Appeals Has Identified No Provision of Law That Would Prohibit an Agency from Engaging in Midterm Bargaining

In *Energy* v. *FLRA*, the Fourth Circuit did not find that midterm bargaining contravened any specific statutory provision, but rather determined that midterm bargaining was "at odds with the policies underlying [the Statute]." 106 F.3d at 1164. As noted above, however, the Fourth Circuit has selectively emphasized certain policy considerations, *i.e.*, its view of effective and efficient government, while ignoring others. But further, by measuring individual bargaining

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[19]The potential anomaly that troubled the *Energy* v. *FLRA* court can only exist if the Court were to find the union's proposal negotiable, *i.e.* consistent with law, but not to resolve the question of an agency's statutory obligation to bargain midterm. Avoiding this potential anomaly is another reason why the Court should, as referenced in note 5, *supra*, resolve the statutory question.

proposals against the broad policies of the Statute, the court has created a negotiability standard not intended by Congress. Specifically, the court finds that midterm bargaining interferes with the public's right to "as effective and efficient a Government as possible." 106 F.3d at 1164 n.9. (quoting *SSA* v. *FLRA*, 956 F.2d at 1288).

A negotiability standard premised on the concept that individual proposals are negotiable only if they produce effectiveness and efficiency is unworkable and not contemplated in the Statute. As discussed above, the bargaining process itself necessarily imposes some burden on agency management that might impact on government effectiveness.

4. The Union's Proposal Is Negotiable Because Bargaining over Union-Initiated Midterm Proposals Is Within the Agency's Discretion

In the instant case, the Authority ordered the Survey to bargain with NFFE over the circumstances under which midterm bargaining could take place. The union's proposal is within the agency's obligation to bargain because nothing prohibits an agency from entertaining a union's request to bargain during the term of the agreement. The obligation to bargain is limited in that it does not extend to matters beyond an agency's legal authority. If an agency and union should agree on a matter not authorized by law, such an agreement is void and unenforceable. *See Department of the Navy, United States Marine Corps*, 34 FLRA 635, 638-39 (1990) (agreement that required agency action inconsistent with law is unenforceable). On the other hand, it is well established that where an agency has discretion under law to act with respect to conditions of employment, it

has an obligation to bargain over the exercise of that discretion. *Department of the Treasury, U.S. Customs Serv.* v. *FLRA*, 836 F.2d 1381, 1384 (D.C. Cir. 1988).[20]

Applying these principles to the instant case, a proposal authorizing midterm bargaining would be outside an agency's obligation to bargain only if the agency is without the discretion to engage in midterm bargaining, *i.e.*, where such bargaining would be illegal. Even the Fourth Circuit recognizes that there is no support for the proposition that midterm bargaining is prohibited by law. As the court stated, "there may be times when an agency might choose to voluntarily enter into midterm bargaining." (Pet. App. 10a n.2; *see also* Pet. App. 9a (agencies are "free to negotiate midterm if they so choose.")). In spite of this concession, the court nonetheless concludes that although an agency has the discretion to bargain midterm, it need not negotiate over a proposal that would commit it to exercising that discretion. Such a conclusion is unsupportable. If there is no legal impediment to participating in such bargaining, there can also be no legal impediment to agreeing, through the collective bargaining process, to do so prospectively.

The court's response is that although an agency can choose to bargain midterm, it "may not be required" to

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[20]An exception to this rule is where a statute specifically reserves the exercise of discretion to an agency's sole and exclusive control. *See, e.g., Illinois National Guard* v. *FLRA*, 854 F.2d 1396, 1405 (D.C. Cir. 1988) (The National Guard Technician Act gave the Secretary of the Army "unfettered discretion" to prescribe hours of work, thus removing the obligation to bargain over the exercise of that discretion). Similarly, the exercise of the enumerated management rights found at section 7106(a) of the Statute is expressly removed from the bargaining obligation. No such express reservation of agency discretion is asserted here.

do so. (Pet App. 9a, 10a n.2). However, the court ignores the fundamental proposition that finding that an agency is obligated to bargain over a specific union proposal does not "require" the agency to adopt that proposal. *Naval Ordnance Station*, 818 F.2d at 551 n.7. Should the agency, through the bargaining process, adopt a proposal providing for midterm bargaining, it would be "required" to bargain midterm only because it agreed to do so.[21]

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded to that court with directions to enforce the Authority's order.[22]

Respectfully submitted,

DAVID M. SMITH*
Solicitor

JAMES F. BLANDFORD
Attorney

* Counsel of Record

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[21]Of course in the federal sector, a proposal may be imposed, over a party's objection, by the Impasses Panel. *See* 5 U.S.C. 7119(c)(5). But that contingency is insufficient to render a matter nonnegotiable. The possibility of reaching impasse and participating in proceedings before the Impasses Panel merely reflects Congress's choice with respect to impasse resolution in the federal sector.

[22]The Solicitor General authorizes the filing of this brief.